

October 19, 2021

MEMORANDUM TO: Board of Directors

FROM: Nicholas Podsiadly, General Counsel

SUBJECT: Proposed Rule: Interagency Proposed Rule to Revise Uniform Rules of Practice and Procedure and FDIC's General Rules of Procedure

Summary: This Interagency Notice of Proposed Rulemaking (NPR) updates and modernizes the Uniform Rules of Practice and Procedure that apply to formal administrative enforcement proceedings brought by the FDIC, the Office of the Comptroller of the Currency (OCC), Federal Reserve Board of Governors (FRB), and the National Credit Union Administration (NCUA) (collectively, Agencies). As part of this process, FDIC staff met and conferred many times over multiple years with staff from the Agencies. The Uniform Rules of Practice and Procedure at 12 C.F.R. Part 308, subpart A, § 308.1-308.41 (Uniform Rules), have not been substantively updated in 25 years. This NPR proposes changes to the Uniform Rules to address the use of electronic communications and technology in all aspects of administrative hearings and to otherwise increase the efficiency and fairness of administrative adjudications. The NPR also proposes to update and modernize the General Rules of Procedure at 12 C.F.R. Part 308, subpart B, § 308.101-308.107 (Local Rules), which only apply to enforcement actions brought by the FDIC. The OCC and the FRB are also making changes to their respective local rules, which are included in the attached NPR.

Recommendation: Staff recommends that the Board approve and authorize for publication in the *Federal Register*, amendments to the Uniform Rules and the Local Rules to modernize and to improve the efficiency and fairness of enforcement proceeding practices and procedures. These changes will address the prevalence of modern technologies to increase efficiency and fairness in

administrative enforcement proceedings. The changes to the Local Rules will foster communication and cooperation between the parties, formally adopt procedures currently followed in the administrative enforcement proceedings, and provide for the possibility of limited depositions during discovery in formal administrative enforcement proceedings. The above changes will also increase transparency in formal administrative enforcement proceedings.

Discussion:

I. Background

Section 916 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183 (1989), required the Agencies and the former Office of Thrift Supervision, to develop uniform rules and procedures for administrative hearings. In August 1991, the Agencies each adopted final Uniform Rules as well as Local Rules specific to each agency¹ and the last substantive modifications to the rules was in 1996.² For the last 25 years, the Agencies have been conducting formal administrative enforcement proceedings under rules of practice and procedure that do not account for prevalent technological advances such as the internet, email, or other types of electronically stored information.

II. Description of the Proposed Rules

A. Proposed Interagency Changes to Part 308, Subpart A – Uniform Rules³

The Agencies propose to update the Uniform Rules to address technological conveniences and accepted legal practices. The proposals include allowing electronic signatures and electronic submissions of legal filings, permitting proceedings to be held by remote means, and modernizing definitions and language. Also, legal counsel may produce documents

¹ The Agencies issued their final rules in August 1991: OCC (56 FR 38024), FRB (56 FR 38052), FDIC (56 FR 37968), and NCUA (56 FR 37767).

² 61 FR 20344, May 6, 1996.

³ These proposed changes will also indirectly affect Part 308, subparts C-I, L-N, and U, as those subparts incorporate, in full or in part, the Uniform and Local Rules. These subparts contain rules and procedures for other types of proceedings such as disapproval of acquisition of control, and assessment of civil money penalties for filing late Call Reports.

electronically in lieu of an in-person inspection of paper documents. Certain filing deadlines were slightly extended to account for the increasing volume and complexity of information involved with formal enforcement hearings. Additionally, the proposed rule makes other minor or technical changes to clarify where filings should be made and to reflect the FDIC's current internal organization and delegations.

The new provisions include: requiring counsel to review and comply with the Uniform Rules; clarifying that a producing party must pay for the costs of its responses to discovery requests; and if an electronic presentation is required for a hearing that a party pays for its share, unless the parties agree otherwise.

B. Proposed FDIC Changes to Part 308, Subpart B – Local Rules

The FDIC's proposed changes to its Local Rules are more substantive than the proposed changes to the Uniform Rules. The proposals reflect the current processes and procedures routinely ordered by the administrative law judges and mirror procedures followed in the federal court system. Staff proposes to add new provisions relating to the modern concept of proportional discovery, electronically stored information, requirements for a joint discovery plan, and disclosure of expert witness testimony. All of these provisions were adopted into the Federal Rules of Civil Procedure between 1993 and 2015, and promote cooperation, fairness, and transparency. FDIC staff proposed that these changes be included in the Uniform Rules; however, the other Agencies all declined.

Currently the only material difference between the Agencies' local rules is that the OCC and FRB permit enforcement counsel to take sworn testimony during the discovery period. The FDIC and NCUA's local rules only permit document discovery. Upon consideration, the Legal Division recommends that the FDIC provide for limited depositions to more closely align with the OCC and FRB's local rules and to provide increased transparency into FDIC proceedings. Accordingly, the NPR contains an amendment to the FDIC's Local Rules to permit limited

depositions during formal discovery by stipulation of the parties or upon a showing of good cause.

Conclusion: Staff recommends that the Board approve the attached NPR and Resolution to adopt and authorize the NPR's publication in the *Federal Register* with a 60-day public comment period.

Staff contacts:

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** Because this matter generally involves legal rules and procedures for formal administrative actions, the Divisions of Risk Management Supervision (RMS), Depositor and Consumer Protection (DCP), and Complex Institution Supervision & Resolution (CISR) were only consulted on the proposal to add depositions to the FDIC's formal discovery procedures.